No. 93-1222

(5)

SUPREME COURT, U.S.
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In the Supreme Court

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United States

OCTOBER TERM, 1993

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and
LOCAL 115,
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
Petitioners,

VS.

SPUN STEAK COMPANY,
A California Corporation,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. NO OTHER COURT HAS REJECTED THE EEOC GUIDELINE ON ENGLISH-ONLY RULES. 1

II. THE GUIDELINE IS REASONABLE AND THEREFORE OWED A LEVEL OF DEFERENCE NOT ACCORDED IT BY THE COURT BELOW. . . 3

A. As Chevron And Its Progeny Make Clear, The Guideline Merits Deference If It Is "Reasonable." 3

B. The Guideline Is Reasonable And Should Be Deferred To. 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

ABF Freight System v. NLRB, ___ U.S. ___, 62 U.S.L.W. 4092, 1994 U.S. LEXIS 1142 (January 24, 1994) 3, 4

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 3, 4, 6

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). . . 4

Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86 (1973) 4

Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) 1, 2

Jurado v. Eleven-Fifty Corporation, 813 F.2d 1406 (9th Cir. 1987) 2

Leary v. United States, 395 U.S. 6, 36 (1969) 5

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 4

Saucedo v. Brothers Well Service, 464 F.Supp. 919 (S.D.Tex. 1979) 6

STATUTES

Civil Rights Act of 1964, 42 U.S.C. § 2000e . . . . . passim

ADMINISTRATIVE AUTHORITIES

29 C.F.R. § 1606.7 . . . . . passim

OTHER AUTHORITIES

Note, "English Only Rules and Innocent Employers: Clarifying National Origin Discrimination," 74 Minn. L. Rev. 387 (1989) 5

For the reasons that follow, none of the arguments advanced by respondent suffice to warrant denial of certiorari in the instant case.

I. NO OTHER COURT HAS REJECTED THE EEOC GUIDELINE ON ENGLISH-ONLY RULES.

Respondent Spun Steak Company ("Spun") asserts that the decision below is on all fours with the opinions of the other Courts of Appeals that have passed on the legality of English-only rules under Title VII. Respondent's Brief in Opposition ("Opp. Brief") at 3-5. That assertion is inaccurate, since no other decisions -- including those cited by Spun -- have ever rejected the EEOC Guideline on speak English-only rules, 29 C.F.R. § 1606.7 (the "Guideline").

Garcia v. Gloor ("Gloor"), 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981), does not support the reasoning of the court below. In that case, the Fifth Circuit upheld the employer's termination of an employee for speaking Spanish, but explicitly noted that it did not have the benefit of an EEOC policy statement on the issue of employers' language policies:

> [The EEOC] has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

Gloor, 618 F.2d at 268 n.1. Since Gloor was decided *before* the EEOC formally promulgated 29 C.F.R. § 1606.7,[1] it obviously cannot be read as supporting the Ninth Circuit's failure to defer to that Guideline. The Fifth Circuit's express caveat that it lacked policy guidance from the EEOC in reaching its decision if anything underscores the importance it placed on that agency's interpretation of Title VII.

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[1] The Fifth Circuit's opinion in Gloor was issued on May 22, 1980. The EEOC issued 29 C.F.R. § 1606.7 on December 30, 1980.

Spun's reliance on Jurado v. Eleven-Fifty Corporation, 813 F.2d 1406 (9th Cir. 1987), is similarly misplaced. In fact, the Ninth Circuit in that case cited the Guideline *with approval.* Jurado, 813 F.2d at 1411. Moreover, Jurado did not address the legality of a plant-wide English-only rule such as that at issue here. That case merely involved a radio station's order to one of its announcers that he not speak Spanish while on the air, since his bilingual format did not have the intended effect of increasing the station's ratings. Accordingly, the Ninth Circuit properly upheld the station's English-only order as "limited, reasonable and business-related". Id.

The decision below cannot be justified by reference to Gloor or Jurado. As petitioners have noted, the Ninth Circuit's rejection of the longstanding Guideline at issue is without precedent, either in the cases cited by Spun or, for that matter, anywhere else. Its standardless refusal to defer to the administrative expertise of the EEOC, charged by Congress with interpreting and enforcing Title VII, warrants certiorari.[2]

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[2] Spun defends the Ninth Circuit's holding that Title VII does not confer any "substantive right" upon employees to "express their cultural heritage", and that an employer has the right to define the contours of the "privilege" of speaking at work. This holding misapprehends the fundamental nature of petitioners' discrimination claim. Petitioners do not assert that they have a "substantive right" to express their cultural heritage in the workplace. Instead, they claim that the unilateral imposition of the speak-English-only rule differentially impairs their ability to converse in a language in which they are most comfortable and suppresses a central aspect of their ethnicity -- their ancestral and primary language. Rather than asserting an independent substantive right, petitioners merely seek to be free from a discriminatory burdens affecting them but not others.

Spun's argument that, under petitioners' theory, employers could not ban Nazi or Communist paraphernalia is absurd. Unlike one's surname or primary language, such political expression is not "an essential national origin characteristic." 29 C.F.R. § 1606.7(a).

II. THE GUIDELINE IS REASONABLE AND THEREFORE OWED A LEVEL OF DEFERENCE NOT ACCORDED IT BY THE COURT BELOW.

Spun suggests that this Court's recent decision in ABF Freight System, Inc. v. NLRB, ___ U.S. ___, 62 U.S.L.W. 4092, 1994 U.S. LEXIS 1142 (January 24, 1994), somehow compels the conclusion that the Guideline does not merit any deference whatever. Opp. Brief at 6-8. To the contrary, the very line of cases to which ABF belongs counsels deference.

A. As Chevron And Its Progeny Make Clear, The Guideline Merits Deference If It Is "Reasonable."

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), this Court set out a framework whereby the courts are to review an agency's construction of the statute it administers. The first inquiry is "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the statute does not clearly address the issue, the courts must then determine whether Congress's delegation of authority to the agency to "fill any gap" in the statute was explicit or implicit. If the delegation is explicit, the agency's construction merits deference unless it is "arbitrary, capricious, or manifestly contrary to the statute." If the delegation is implicit, deference is still required in that "a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency." 467 U.S. at 843-44 (emphasis supplied).

This Court's decision in ABF simply applies Chevron's deference analysis. In ABF, the Court upheld the action of the National Labor Relations Board in ordering reinstatement and backpay for an employee who had been fired for his union activities on the pretextual basis that he had arrived late to work, notwithstanding the fact that he had lied about the reasons for his tardiness. In so doing, the Court found Congress had expressly authorized the Board to fashion remedies where unfair labor practices had occurred. Thus, following and citing to Chevron,

this Court found that "[b]ecause this case involves that kind of *express* delegation, the Board's views merit the greatest deference." 1994 U.S. LEXIS 1142, *13-*14 (emphasis supplied).

Because the case below involves an *implicit* delegation to the EEOC by Congress on the subject of language-based discrimination (since Congress left the concept of discrimination on the basis of national origin undefined, see Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 89 (1973)), Chevron still requires deference to the agency's construction if it is "reasonable." Contrary to Spun's claim, it is immaterial under Chevron that the EEOC does not possess Congressionally delegated rulemaking authority; see also EEOC v. Arabian American Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Thus, ABF cannot be read as requiring less deference. Spun's citation to Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), is similarly unavailing since Spun, like the court below, cannot show that the Guideline is "at odds with the plain language of the statute itself."

B. The Guideline Is Reasonable And Should Be Deferred To.

Spun -- and the Ninth Circuit -- ignores the fact that the Guideline's presumption that English-only rules adversely impact national origin minorities is based upon two distinct findings of the EEOC. First, such rules deny these minorities the opportunity to speak "their primary language of the language they speak most comfortably", a right afforded to native English speakers. 29 C.F.R. § 1606.7(a). That truth is self-evident and is not disputed by the Ninth Circuit.

Second, such rules tend to create "an atmosphere of inferiority, isolation and intimidation based on national origin and could result in a discriminatory working environment." Id. This finding is entirely reasonable. Speak English-only rules are inherently pervasive, applying to virtually all employees irrespective of the content of their conversation. By their very operation, they suppress an essential aspect of employees' ethnicity and national origin and impinge upon their communication. Unlike

native English speakers, non-native speakers "must consciously and continuously monitor their speech" on pain of discipline or termination. Note, "English Only Rules and Innocent Employers: Clarifying National Origin Discrimination," 74 Minn. L. Rev. 387, 426 (1989).

Either of these reasons provides a rational basis for the Guideline's presumption. Cf. Leary v. United States, 395 U.S. 6, 36 (1969) (presumption rational if it "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend").

The reasonableness of the Guideline is not negated by Spun's exaggerated characterization of its impact upon employers. The Guideline's presumption of a disparate impact does *not* make English-only rules unlawful *per se*. Rather, it merely places on the employer the task of justifying them by reference to business necessity. As the evidence cited in Spun's brief in support of the speak English-only rule (*i.e.*, that it was needed to stop the harassment of co-workers) demonstrates, employers are well equipped to respond to that burden.[3] On the other hand, the

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[3] Spun's "evidence" of harassment of co-workers is irrelevant to whether an English-only rule has an adverse impact upon those restricted by it; instead, that evidence relates to the justification for the rule. In that regard, it should be noted that in view of the fact that the allegations of abuse were confined to two employees, there was no reason to impose a company-wide English-only rule on all Latino employees. Such a broad measure, if anything, is likely to be destructive of employee morale. As petitioners' expert explained below:

> Morale problems which stem from employee conflicts, particularly when they occur along racial and cultural lines, are best addressed by positive and constructive steps which build trust and mutual respect, such as mediation, increased cross-cultural awareness, and opening lines of communications to permit employees to discuss their fears and suspicions. This is far more effective than suppressing the rights of one particular segment of the workforce. . . .
>
> In the context of a workplace, where foreign languages are spoken and some employees suspect they are being spoken about, the

(continued...)

Ninth Circuit's holding that petitioners' percipient testimony and expert evidence as to the pernicious effect of the English-only rule failed to raise even a triable issue of fact as to disparate impact demonstrates that, absent the Guideline, virtually all attempts to establish prima facie discrimination in these cases will be doomed to fail at the courthouse door.[4]

Finally, Spun argues that "it is the province of Congress, not the courts, to weigh conflicting views of public policy." Opp. Brief at 14. The choice at bar, however, is not between the judgments of Congress and the courts; the choice is between the courts and the administrative agencies of the Executive Branch. The issue presented is whether a court may substitute its policy preferences for the considered and consistent interpretation of a statute by the administrative agency charged with its enforcement, an interpretation informed by the agency's experience and expertise particular to the matter at hand. As this Court observed in Chevron, supra:

> Judges are not experts in the field, and are not part of either political branch of the Government.

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[3](...continued)

> implementation of an English-only rule can be counterproductive; the imposition of an English-only rule by management is likely to confirm and validate the fears and suspicions of the English speaking employees. This can result in English speaking employees harboring even greater distrust of employees who speak foreign languages while at the same time making foreign language speaking employees resentful for being unfairly punished when they have done nothing wrong. It may also be perceived as an insult to their culture and ethnicity. . . .

Declaration of Michael B. Adams In Opposition to Defendant's Motion for Summary Judgment, ¶¶ 7-8 (emphasis in original).

[4] Spun glibly cites Saucedo v. Brothers Well Service, 464 F.Supp. 919 (S.D.Tex. 1979), as an example of a plaintiff proving a prima facie case of discrimination by an English-only rule based on the facts and not the presumption contained in the Guideline. Yet, the reasoning of and result in Saucedo is squarely at odds with that of the Ninth Circuit decision below. Its vitality following the instant case appears doubtful.

> Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.

467 U.S. at 865. By rejecting the EEOC's experience and expertise and finding *as a matter of law* that English-only rules do not inflict any "significant" harm on national origin minorities whose ancestral and primary languages are suppressed, the Ninth Circuit contravened this fundamental tenet.

CONCLUSION

Respondent's arguments are without merit. Petitioners respectfully request that this Court grant the writ of certiorari prayed for.

Respectfully submitted,

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